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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 1183

LENA L. BUSH, *Petitioner*,

v.

THE ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

May it please the Court:

The petition of Lena L. Bush respectfully shows to the Court:

A. SUMMARY STATEMENT OF THE MATTER INVOLVED.

The petitioner, of Brattleboro, Vermont, sued the respondent, an Ohio corporation, in the Vermont State County Court, claiming $5,000 as beneficiary (R. 1) under a certificate issued by respondent insuring her husband, Frank Lee Bush,—

> "for death due to accidental means alone, and independent of all other causes" (R. 40).

The case was removed to the United States District Court for the District of Vermont on the petition of the defendant upon the ground of diversity of citizenship (R. 1).

The trial court granted defendant's motion for a directed verdict interposed at the close of the plaintiff's evidence, and upon the directed verdict judgment was entered (R. 52) which was affirmed by the Circuit Court of Appeals for the Second Circuit by a divided court upon the ground that the quoted provision of the policy was of like effect as though it excluded death occasioned wholly or partly, directly or indirectly, by disease or by bodily infirmity. Circuit Judge Charles E. Clark filed a dissenting opinion (R. 61).

The testimony upon which the plaintiff sought to go to the jury was in brief as follows:

The insured was when he died fifty-six years of age. His health was good and he was strong and active. He had been until the middle of the summer of 1939 employed as a salesman by the Johns Manville Corporation, travelling in Vermont and northern New Hampshire and working long hours, nights and Sundays. He was a sportsman, an active member of a rifle club, always ready to hunt, fish or boat. He had on August 12, 1939, gone from Brattleboro with the petitioner to York Harbor, Maine, for a few days' vacation, staying in a cabin on the seashore about a mile from the Village of York Harbor (R. 2).

Early on the morning of his death, August 16, 1939, he had been fishing with vacation companions who described him as a hale and hearty man to go fishing with, very jovial and lively, with nothing seemingly wrong with him (R. 4-5).

When the party returned at about eight-thirty in the morning, the insured stepped out of the boat at the shore onto smooth and slimy rocks partly covered by about five inches of water, some of the rocks protruding through the water. As he stepped out he slipped or tripped and fell backwards on these rocks. He immediately complained of being a little dizzy and was helped to his cabin by his companions, a distance of about a hundred feet, and then lay

down and rested for a time. Around eleven or eleven-thirty he drove his car with one of his fishing companions about a mile to York Harbor, where his companion went into a store to get things to repair the boat, and when his companion came back in less than ten minutes, the insured was sitting where he had left him, at the wheel of his car, dead (R. 8-11).

Physicians described the condition of his heart and other organs and accounted for the death as follows: The bladder was abnormally small with walls greatly thickened, tough and hard (R. 25); it had been inflamed for a long time and in that condition small pieces would break off which if they got into the veins around the bladder might form clots (R. 28); a clot so formed might be held in place, but if loosened by a fall, would move and if such a clot was moved into a place where it would cut off circulation, it would cause death. The fall had, in the physicians' opinion, moved such an old clot into the *vena cava,* a large vessel leading directly to the auricle of the heart, and it had lodged partly in the auricle and caused death (R. 3). Such a clot described as an old one was found lodged in the auricle of the heart and extending into the inferior *vena cava* (R. 24-25). Such an occurrence is sometimes called an "embolism" (R. 39). The fall had caused the clot to be where its position caused death but was not the cause of the clot forming (R. 3, 28-30).

The case thus presented is one in which "in the common speech of man" the death resulted from the accident.

So far as the jury was informed by the lay witnesses, the facts were that a man in normal health and of robust activity until he suffered a violent fall, immediately thereafter became partially disabled and within a few hours died.

By the expert post mortem observation and opinion, the jury was told that an abnormal condition, the presence in the veins of a formed but stationary clot, had made possible the result, death, and that the probable cause of the existence of the clot was long-standing inflammation of the bladder. There was no intimation in this expert testimony that the mere presence of the clot in the condition and posi-

tion it was and had long been until affected by the accident, would have caused disability or death. If there had been expert opinion indicating pre-existing disability in any degree, it would have been contradicted by the lay testimony of good health and full ability.

Upon such a case, there are several differing judicial views, all supported by substantial authority.

One view is that if pre-existing disability from disease is a factor contributing to the death, to the extent that the accident would not have happened to one free from the disease, or if the accident had happened to one free of the disease the result would not have been death, there can be no recovery on an accident policy, on the ground that the death is not then considered to have occurred "solely" by accidental causes, or "independently" of other causes, as is quite invariably provided in accident policies. This view appears to have controlled the decisions of the Second Circuit before *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64.

A second and more liberal view is that recovery may be had if the accident causes death even though the accident to a person free from a defect or disability would not have caused death. This ruling is arrived at by reasoning similar to that used in determining the proximate cause in negligence cases, it being held that if the death is the result of the accident with an unbroken chain of causation, then it is the "sole" or "independent" cause. Latent disease not harmful until activated and not inherently progressive, by reason of which the accident results fatally, does not break the chain of causation from the accident to the death.

There is variation of this view, which for convenience may be called a third view, which is that taken by the Vermont courts. It coincides with the view last stated unless the policy contains an additional clause, which many policies in litigation have contained, in effect, that the policy shall not cover loss of life "directly or indirectly, wholly or in part, due to disease or infirmity." According to this

view, if disease or infirmity is indirectly involved, it is held that death is caused wholly and solely by the accident, but because of the additional restrictive clause, recovery is barred by the fact that the death is indirectly or remotely due to disease or infirmity.

What may be called a fourth view is held by courts even more liberal. Whether or not the additional restrictive clause is in the policy, such courts emphasize the fact that no person is wholly free from physical ailment and that accidents and their results are normally contributed to by human imperfections. Under this view if the death is the result of accident "in the common speech of man," recovery may be had on an accident policy even though frailty or infirmity may have caused it or contributed to its dire consequences. This view was well stated by Judge Cardozo in what is perhaps the leading modern case on the subject, *Silverstein* v. *Metropolitan Life Ins. Co.*, 254 N. Y. 81, where the policy required not only that the loss be caused "directly and independently of all other causes by accidental means," but also that it was not to cover death "caused wholly or partly by disease or bodily or mental infirmity * * * ".

The Second Circuit decision here under review involves, as above noted, a policy of the more modern and liberal type, which though it insures against death only if it be solely from accidental cause, yet does not contain the additional restrictive clause excluding deaths caused directly or indirectly, wholly or in part, by disease or infirmity. The Circuit Court of Appeals expressly holds that it makes no difference whether or not the policy contains the additional restrictive clause, because in the opinion of the Court a death is not due to accidental means alone, independent or other causes, if it be indirectly or partly occasioned by disease or bodily infirmity. It is immaterial to determine whether such a view is tenable or arguable, but it is directly contrary to the Vermont view.

Sharply differing from the majority opinion below, Circuit Judge Charles E. Clark in his dissenting opinion points out that the Vermont court in *Clark* v. *Employers Liability Assur. Co.*, 72 Vt. 458, distinguishes between policies containing the additional restrictive clause and those which do not.

Judge Clark was of opinion that consistently with the Vermont cases and with Judge Cardozo's approach to the troubled subject in *Silverstein* v. *Metropolitan Life Ins. Co.*, 254 N. Y. 81, the plaintiff was entitled to take her case to the jury.

B. JURISDICTIONAL STATEMENT.

This Court may require by certiorari that this cause be certified to it for determination pursuant to the Act of February 13, 1935, c. 229, Sec. 1, 43 Stats. 938, amending and re-enacting Sec. 240 (a) of the Judicial Code, 28 U. S. C. A., Sec. 347. The judgment of the Circuit Court of Appeals sought to be reviewed was entered January 27, 1942 **(R. 26).**

C. THE QUESTIONS PRESENTED.

The questions here presented are:

Did the Circuit Court of Appeals correctly determine and apply the applicable State law?

Under the Vermont law is an accident policy without a clause excluding recovery for death caused "indirectly" by disease as restricted in its benefits as one containing such a clause?

Was there a question of fact to be submitted to the jury?

The petitioner contends that the law relating to accident policies as established in Vermont should have been applied by the Federal courts below,—that under the Vermont rule the evidence required the submission to the jury, under proper instructions, of the question whether the death was by accidental means alone independent of other causes,—that under the Vermont rule if the accident be the proximate cause of the death, the jury may find that the death was

caused directly and wholly by the accident though disease or infirmity contributed indirectly to it,—and that under the Vermont rule an additional clause formerly frequently in policies excluding deaths "directly or indirectly, wholly or in part, due to disease or infirmity," not in the policy here sued on, is necessary to exclude liability where a latent bodily infirmity is an indirect contributing cause or condition involved in the fatality.

D. REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The doctrine of *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, calling for the application of the Vermont State law to a cause in the Federal courts solely by reason of diverse citizenship, has been violated by the opinion and judgment of the Circuit Court of Appeals.

2. Suits on policies of insurance constitute a class of cases in which Federal jurisdiction is frequently and exclusively founded on diverse citizenship, and it is of general importance that the aforesaid principle settled by *Erie Railroad Co.* v. *Tompkins* should be more than merely formally enforced in such cases and not whittled away by a mere casual consideration of the applicable State law. As exemplifying a proper enforcement of the rule, we refer to the opinion of the Circuit Court of Appeals of the Eighth Circuit in *Clay County Cotton Co.* v. *Home Life Ins. Co.,* 113 F. (2d) 856, 859, wherein the Court in a similar accident insurance case arising in Arkansas determined and applied the substantive law involved in a motion to direct a verdict by a consideration exclusively of the Arkansas decisions.

3. Trial by jury has been denied to the plaintiff contrary to the Seventh Amendment to the Constitution of the United States and the principles of the common law.

Wherefore the petitioner prays for the allowance of a writ of certiorari to the United States Court of Appeals for the Second Circuit in the case entitled *Lena L. Bush* v.

The Order of United Commercial Travelers of America, No. 75, October Term, 1941, in order that said case may be reviewed and determined by this Honorable Court.

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